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No. 84-1905

In The

Supreme Court of the United States

October Term, 1984

MARGARET HECKLER, Secretary of Health and Human Services,

Appellant,

v.

BUENTA M. OWENS and KENNETH R. OWENS, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Appellees accept the Secretary's characterization of the appeal on the merits.

2. The Secretary's appeal on the class issue should be framed as follows: Whether the district court, in certifying a class, properly interpreted 42 U.S.C. § 405(g).

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MOTION TO DISMISS OR AFFIRM

Appellees move the Court to affirm that portion of the appeal designated as Question 1, on the ground that the question is so unsubstantial as not to warrant further argument, especially in light of Congress' correction of the offending provisions.

Appellees move the Court to dismiss from its docket, and remand to the Court of Appeals, that portion of the appeal designated as Question 2, on the ground that, if the decision on the merits is summarily affirmed, the pendent appeal on the class issue should not be considered in the first instance by this Court under 28 U.S.C. § 1252.

OPINIONS BELOW

The district court's order certifying the class (Appendix to Secretary's Jurisdictional Statement (hereinafter, "Sec.App."), 13a-28a) is reported in the CCH Unemployment Insurance Reporter, at ¶ 16,050.

The district court's original decision on the merits, granting the Secretary's motion for summary judgment (Sec.App., 1a-12a), is unreported. On October 5, 1984, the district court granted plaintiffs' motion to alter or amend. (Sec.App. 29a.) It held the challenged provisions unconstitutional (Sec.App. 30a-43a) in an order reported in the CCH Unemployment Insurance Reporter, at ¶15,798. Judgment was entered on December 26, 1984 (Sec.App., 44a-46a), and is reported in the CCH Unemployment Insurance Reporter, at ¶15,893.

JURISDICTION

There is a factual error in the Secretary's statement of Jurisdiction. Her amended notice of appeal was filed on March 8, not March 9, 1985. See Jurisdictional Statement, at 1; Sec. App., 49a.

The Jurisdictional Statement was filed on June 5, 1985, and counsel received it on June 10, 1985. By order of the Clerk dated June 19, 1985, the time to file a responsive pleading was extended to August 9, 1985.

As will be more fully discussed herein, appellees (hereinafter, "plaintiffs") do not agree that the Court should exercise its jurisdiction over the Secretary's appeal on the class issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fifth Amendment and 42 U.S.C. §§ 402(e)(1)(A), (4), (f)(1)(A), (5), and 405(g) are reproduced in pertinent parts in the Secretary's Appendix to the Jurisdictional Statement, at 53a-57a.

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STATEMENT OF THE CASE

In December, 1984, the district court entered a judgment in this previously certified class action holding certain provisions of the Social Security Act unconstitutional. Those provisions allowed surviving widowed spouses to continue to receive survivors' benefits on the accounts of their deceased wage-earning spouses if they remarried at age 60 or over, while their identically situated counterparts, surviving divorced spouses, were deprived of survivors' benefits if they remarried. The court's judgment had no impact on future applicants, as the scheme had been corrected by Congress in 1983, so that the effect of the declaratory and injunctive relief was solely to provide benefits to class members for part of the five-year period in which the unconstitutional provisions were in effect. Despite the inherently limited nature of this ruling, the Secretary chose to appeal, arguing that the district court was wrong on both the merits and on its class action determination.

A. THE STATUTORY SCHEME

1. The issue on the merits

The Social Security Act provides for payment of retirement and disability benefits to individuals fully insured under the Act, and also to their spouses, their divorced spouses, and certain of their survivors. This latter group, survivors, include widows and widowers, and also surviving divorced spouses, provided the marriage lasted for a statutorily set period of years. 42 U.S.C. §§ 402(e),(f), 416(d)(2),(5).

Since 1979, the entitlement of widows and widowers age 60 or over has been unaffected by remarriage. *Id.*, §§ 402(e)(4),(f)(5) (1983). Until January 1, 1984, however, surviving divorced spouses lost their survivors' benefits if they remarried at age 60 or over. *Id.*, §§ 402(e)(1)(A), (4), (f)(1)(A), (5) (1983). Effective on that date, the deprivation of survivors' benefits to surviving divorced spouses who remarried at age 60 or over was removed, so that they were then treated identically with remarrying widows and widowers. See Pub.L. No. 98-21, §§ 131, 304, 97 Stat. 92, 93, 111, amending and redesignating 42 U.S.C. §§ 402(e)(3) and (f)(4).

When Congress was considering the legislation which ultimately ensured unreduced survivors' benefits upon remarriage for widows and widowers, Pub. L. No. 95-216, §§ 336(a)(3) and (b)(3), 91 Stat. 1547, amending 42 U.S.C. §§ 402(e)(4) and (f)(5), the House urged that survivors' benefits should likewise be continued for surviving divorced spouses who remarried. It was

> "concerned about the effect of [the marriage] provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recom-

> mended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts."

H.Rep. No. 95-702(I), 95th Cong., 1st Sess. 48 (1977), reprinted in [1977] U.S.Code Cong. & Admin. News 4155, 4205. In conference, however, it was decided to limit benefits for remarrying survivors to widows and widowers; there was no explanation for this decision to discriminate against divorced survivors. See H.Conf.Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977), reprinted in [1977] U.S. Code Cong. & Admin. News 4308, 4319. Accordingly, the 1977 amendments, which took effect on January 1, 1979, created the discrepancy between surviving widowed spouses and surviving divorced spouses, by treating them differently solely in the instance where a survivor remarried at age 60 or above.

2. Class certification in the context of 42 U.S.C. § 405(g)

A claimant for benefits under the Social Security Act is entitled to seek administrative review of an adverse decision. If still dissatisfied with the Secretary's determination, a claimant has the right to file a complaint for judicial review in the district court.

Under regulations issued by the Secretary, a claimant must initiate each stage of the administrative process within 60 days of the adverse prior decision which is being challenged. The Social Security Act, through 42 U.S.C. § 405(g), provides a statute of limitations of sixty days for the filing of the complaint in district court.

Rule 23 of the Federal Rules of Civil Procedure authorizes a district court to certify a case to proceed as a class action when the four requirements of Rule 23(a) are

satisfied and when one of the three provisions of Rule 23(b) is met. In *Califano v. Yamasaki*, 442 U.S. 682, 699-701 (1979), this Court expressly held that, where the requirements of Rule 23 are satisfied, class actions are certifiable in cases brought pursuant to § 405(g). Thus, as in any other class action, relief will flow to all class members in a successful challenge brought on behalf of a class of similarly situated claimants.

B. PROCEEDINGS IN THIS CASE

1. The merits

a. The named plaintiffs, Buenta and Kenneth Owens, were each married to their former spouses for well over twenty years before their divorces. In 1978, when she was 61 and he was 60, Buenta and Kenneth married each other. In July, 1982, after both of their former spouses had died, each applied for survivors' benefits on the wage records of those spouses. Because the challenged provisions did not provide for survivors' benefits to divorced surviving spouses who remarried, both claims were denied.

On October 19, 1982, Mrs. Owens sought reconsidera- of that determination, but that was also denied. Since the only issue was the constitutionality of 42 U.S.C. § 402(e)(4), she requested that further administrative review of her claim be waived. The Secretary granted that request on March 3, 1983 (Sec.App. 50a-51a), and on April 19, 1983, Mrs. Owens filed her complaint in district court.

Similarly, Mr. Owens also sought reconsideration, which was denied on May 12, 1983. He too sought waiver of the administrative process, which was granted on November 23, 1983. (Sec.App., 52a-53a.) He then filed a similar complaint in district court on January 6 ,1984, and the two cases were consolidated.

b. While plaintiff Buenta Owens was waiting for the Secretary to respond to an order compelling answers to interrogatories directed at the approximate size of the class, and while the Secretary was contemplating Mr. Owens' request for waiver of exhaustion, the Secretary filed a motion for summary judgment in Mrs. Owens' case. After plaintiff cross-moved, the district court entered judgment for the Secretary, on December 23, 1983. The court analyzed the scheme under the rational basis test, noting the broad deference which must be accorded a legislature under that analysis. (Sec.App., 7a-8a.) It considered

> "two conceivable bases for the statutory discrimination: 1) that Congress could have rationally distinguished between widows and surviving divorced spouses on the basis for [*sic*] their differing dependence on the primary wage earner, and 2) that Congress rationally could have decided to remedy the problems created by termination of benefits on remarriage one step at a time, extending benefits first to widows and later to surviving divorced spouses." (*Id.* at 8a).

The court first rejected the Secretary's contention that *Mathews v. de Castro*, 429 U.S. 181 (1976), resolved the issue of this case because of its recognition of varying dependency between divorced and non-divorced surviving spouses. It held that the distinction observed in *de Castro* "rested explicitly upon considerations of dependency during the lifetime of the primary wage earner and thus is inapplicable to the issue of widows' and surviving divorced spouses' dependence upon a now-deceased primary wage earner." (*Id.* at 9a.)

Judge Byrne noted the crucial factor which foreclosed the conclusion that Congress could rationally distinguish between widows and surviving divorced spouses:

> "Congress has allowed both groups benefits after the death of the primary wage earner. The only distinction between the groups comes after remarriage following death, not after divorce . . . . Congress is not implying that divorced persons are more likely to 'go their own way' after divorce—divorce does not trigger the critical distinction—remarriage does. In order to prevail on an assertion of varying dependence, the Court must find logical reasons why surviving divorced spouses *on remarriage* are less dependent upon a now deceased primary wage earner than are widows *on remarriage*. No tenable basis for such a distinction has been presented, nor is one discernible to the Court." (*Id.* at 10a; emphasis in original.)

Notwithstanding its conclusion that there was no rational basis on which to distinguish the two classes, the district court found the scheme to be constitutional. It held that Congress could move "one step at a time" in extending benefits, even if the step which it took, as in this instance, was irrational. (*Id.* at 10a-11a.) As a practical matter, the court concluded that it was always rational for Congress to move forward gradually, regardless of the disparate treatment which resulted.

Mrs. Owens timely filed a Rule 59 motion, contending that the court's "one-step-at-a-time" analysis had misconstrued this Court's holdings. (See Sec.App., 10a-11a.)[1] On October 5, 1984, Judge Byrne acknowledged his error and granted the motion for reconsideration. (*Id.* at 29a.) In his order granting plaintiffs' motion for summary judgment (*id.* at 30a-43a), the judge again carefully reviewed

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[1] In the meantime, Mr. Owens, whose complaint was filed shortly after the court ruled against Mrs. Owens, moved for summary judgment.

the history of the statutory scheme and its background, but made a key change in his analysis:

> "[T]he fact that Congress moved one step at a time in its efforts to alleviate the hardships of the remarriage rule does not in and of itself provide a rational basis for the statutory distinction here. *Congress must have a rational basis for each step it takes.*" (*Id.* at 40a; emphasis supplied.)

He then observed that in each of the three decisions of this Court on which he had relied to support his prior holding (see *id.* at 10a-11a), this Court had found "an independent rational basis" for the step in question. (*Id.* at 40a.)

The court then evaluated the rationality of the scheme in a manner similar to its previous analysis. Judge Byrne recognized again that "Congress decided to treat the two groups identically upon death of the primary wage earner." (*Id.* at 42a.) For the Secretary to prevail, therefore,

> "Congress would have to have had some logical reason to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows." (*Id.* at 42a.)

With this premise in mind, the court concluded that the scheme was irrational:

> "Defendant has been unable to present a logical basis for this distinction and none is apparent to the Court. Common sense suggests that if any rational distinction was to be made between the two groups, it should be made at the outset, upon the death of the primary wage earner, not on later remarriage. Whatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, those differences would likely be

erased by marriage. This was the rationale behind the original marriage and remarriage rules enacted as part of the Social Security Act. As now challenged, however, former sections 202(e) (4) and (f) (5) lack any conceivable basis in fact and thus fail the rational basis test." (*Id.* at 42a.)

On December 26, 1984, the Court entered judgment enjoining the challenged provisions. (*Id.* at 44a-46a.) The Secretary moved under Rule 59 to reconsider all aspects of the judgment, again arguing that Congress' gradual extension of survivors' benefits was *per se* rational and that the scheme did not violate the guarantees of equal protection. The motion was denied. (*Id.* at 47a.)

2. Class certification

Shortly before the district court's original ruling on the merits, the Secretary complied with the order compelling answers to interrogatories and stated that "approximately one hundred eighteen surviving divorced spouses who have remarried at age 60 or thereafter, and who meet all other eligibility requirements, were denied benefits between July 1, 1982 and June 30, 1983." Since this information demonstrated the impracticability of joinder, plaintiffs moved to certify a nationwide class, to consist of all those denied benefits during the five-year period in which the unconstitutional scheme had been in effect, January 1, 1979 through December 31, 1983, inclusive.

In its order of August 28, 1984 granting the motion, the district court held that the four components of Rule 23(a) were satisfied and that, as injunctive and declaratory relief for the class as a whole were appropriate, Rule 23(b) (2) was met. (*Id.* at 24a-26a.)

The court rejected most of the Secretary's arguments about the alleged effect of § 405(g) on certification. That provision, it held, did not forbid inclusion of individuals residing outside the judicial district in which the complaint was filed. (*Id.* at 22a-23a.) Furthermore, all class members had satisfied "the only purely jurisdictional element of section 405(g)", presentation of the claim. (*Id.* at 16a.)

The Secretary's contention that § 405(g) required each class member to exhaust was overruled, because, as this Court had held in *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976), it was not a jurisdictional requirement and therefore could be waived. (Sec.App., 17a.) Since the Secretary had not required exhaustion for the named plaintiffs under regulations expressly providing for waiver, the district court held that the Secretary had waived exhaustion for the class members. (*Id.* at 17a-18a.) In addition, since the only issue on the merits was the constitutionality of the challenged provisions, the court held in the alternative, following *Salfi* and *Eldridge*, that it should exercise its own authority to waive exhaustion: "[T]o require such exhaustion would be futile and serve no judicial or administrative interest." (*Id.* at 19a.)[2]

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[2] The district court's actual order of certification contained a technical error on the exhaustion issue. (See Sec.App.28a.) The original order limited the class in part to those who had "*completed the administrative appeal process* following a denial of such application on or after August 20, 1982." (Emphasis supplied.) Plaintiffs moved to eliminate this apparently unintentional exhaustion requirement, and the Secretary did not oppose the motion. Accordingly, on October 5, 1984, the district court entered an amended order which eliminated this error. (Appendix to Cross-Appellants' Jurisdictional Statement, *Owens v. Heckler*, No. 85-31 (docketed July 5, 1985), at 1a-2a; see also Sec.App., 44a.)

With respect to the Secretary's final argument under § 405(g), the court concluded that since the Secretary had not waived the 60-day requirement, the class would be limited to those who had satisfied that rule. (*Id.* at 21a.) But since, "like all statutes of limitations, the 60-day limitation period is subject to tolling," (*id.* at 21a), the court held that the period for filing was tolled. It set the tolling date as sixty days prior to the filing of Mrs. Owens' request for reconsideration, for "the filing of a single administrative complaint gives the defendant adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons." (*Id.* at 22a.)

The district court thus defined the class to include all those who had live claims on or after August 20, 1982. While the class did not include everyone affected by the challenged provisions from 1979 through 1983, as plaintiffs had requested,[3] it did include claimants over whom, the Secretary had contended, the district court lacked jurisdiction.

After judgment was entered, the Secretary sought reconsideration of the court's class ruling as well. She raised the same arguments as in her opposition to the motion for class certification, and the district court rejected them again. (*Id.* at 47a.)

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[3] Plaintiffs have filed a cross-appeal on this aspect of the court's order. *Owens v. Heckler, supra,* No. 85-31.

THE QUESTIONS ARE NOT SUFFICIENTLY SUBSTANTIAL TO WARRANT PLENARY REVIEW, OR SHOULD BE DISMISSED

I. THE DISTRICT COURT'S CAREFUL ANALYSIS OF THE CHALLENGED PROVISIONS PROPERLY APPLIED THIS COURT'S PRECEDENT, AND, IN ANY EVENT, CONGRESS HAS CORRECTED THE UNCONSTITUTIONAL SCHEME

Congress determined that surviving spouses, both divorced and non-divorced, were entitled to survivors' benefits, thus recognizing that divorce was not relevant to the issue of survivors' benefits. Similarly, Congress determined that a surviving spouse who remarries should receive survivors' benefits, thus recognizing that remarriage has no bearing on entitlement to survivors' benefits. As a matter of fact, therefore, Congress concluded that neither divorce nor remarriage was a relevant factor in the award of survivors' benefits. Consequently, the district court was correct in holding that Congress could not rationally limit survivors' benefits solely to non-divorced surviving spouses who remarry. Its careful reviews of the scheme and the case law indicate that summary affirmance is the correct resolution of the pending appeal. This perception has been enhanced by this Court's recent application of the rational basis test to strike down a structurally similar scheme.

Moreover, the small size of the class in this case and the fact that the unconstitutional scheme has already been corrected also militate against plenary review. If thousands of claimants and many millions of dollars were at stake, this case would obviously take on greater importance. But not only is its immediate effect on the Social Security trust fund minuscule; it will have no prospective impact

whatsoever, as Congress has now corrected the challenged deficiency.

1. Under the rational basis test, a classificatory scheme must be judged by whether it "advances legitimate legislative goals in a rational fashion." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).[4] The standard, while frequently stated, is often ignored by the government, despite this Court's repeated admonition that it is "not a toothless one." See, *e.g.*, *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

The test requires consideration of two factors, not one: whether the legislative goal is legitimate, *and* whether the government rationally achieves that goal. The Secretary focuses on the first point, arguing that Congress had a valid purpose, which she broadly defines as the gradual liberalization of the remarriage rule. For the purpose of this argument, the validity of that position need not be considered. What definitively brands this scheme as irrational is the manner in which Congress sought to achieve its alleged goal.

The Secretary's argument fails because she can offer no reasoned explanation as to why remarriage presents different considerations for the two groups of surviving spouses, divorced and not divorced, when they were accorded identical treatment prior to remarriage. Instead, the Secretary repeatedly argues that "Congress rationally could determine that a divorced spouse in general would be

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[4] See also, e.g., *City of Cleburne, Texas v. Cleburne Living Center*, 53 U.S.L.W. 5022, 5023 (July 1, 1985); *Hooper v. Bernalillo County Assessor*, 53 U.S.L.W. 4827, 4830 (June 24, 1985); *U.S. Railroad Retirement Board v. Fritz*, 453 U.S. 166, 177 (1980).

less dependent upon the primary wage earner at the time of the latter's death than would a spouse who remained married to the wage earner until the time of his death." Jur.Statement, at 14-15. In making this contention, the Secretary appears to be relying on the general rule that the government may suggest any rationale in support of a scheme, even one produced only "by the ingenuity of a government lawyer . . . ." *Schweiker v. Wilson, supra,* 450 U.S., at 244 (Powell, J., dissenting).[5] But the government's freedom to devise a possible rationale on which Congress might have relied is not so extensive as to allow it to fashion after-the-fact reasoning on which Congress expressly did not rely.

Congress was not required to provide Social Security benefits to anyone, or to any survivors, or to any divorced spouses; it was not bound to provide them to surviving divorced spouses. But it did so, thus determining that surviving spouses were all equally entitled, regardless of the spouses' marital status at the deaths of the wage earners. The Secretary cannot, therefore, hypothesize as to what Congress might have determined about the relative dependencies of divorced and non-divorced surviving spouses, when Congress has expressly reached a contrary conclusion. Speculation on Congressional intent cannot support disparate treatment when, *in fact,* Congress concluded that the groups are indistinguishable.

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[5] See *Schweiker v. Wilson, supra,* 450 U.S., at 244-45 (Powell, J., dissenting) for a suggestion as to a more appropriate standard for reviewing these "*post hoc* hypotheses about legislative purpose, unsupported by the legislative history." See also *U.S. Railroad Retirement Board v. Fritz, supra,* 449 U.S., at 180-181 (Stevens, J., concurring in the judgment), cited in *City of Cleburne, Texas v. Cleburne Living Center, supra,* 53 U.S.L.W., at 5027 n.4 (Stevens, J., concurring).

Congress decided that divorce was irrelevant to the receipt of survivors' benefits . It also decided that remarriage was irrelevant to the receipt of survivors' benefits. With those points resolved, it was illogical to determine that divorce *became* relevant when the surviving spouse remarried, and the district court's conclusion on this point succinctly summarized the inadequacy of that contention. Judge Byrne stated that no "logical basis" existed "to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows . . . ." (Sec.App., 42a.)

As in the district court, the Secretary relies largely on this Court's rulings in *Mathews v. de Castro*, 429 U.S. 181 (1976), and *Califano v. Jobst*, 434 U.S. 47 (1977).[6] While those decisions do discuss divorce and remarriage as factors in the receipt of Social Security benefits, they are inapposite in this context.

The issue in *de Castro* was the constitutionality of a provision which provided benefits to a wife caring for a child if the husband became disabled or retired, while a divorced wife in the same situation was not eligible for those benefits. See 429 U.S., at 181-82. This Court upheld that differential treatment because "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." *Id.*, at 188. The Secretary argues that this holding resolves the issue of this

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[6] The Secretary boldly states that the district judge's "holding is foreclosed by this Court's decisions in *de Castro* . . . and *Jobst* . . . ." Jur. Statement, at 12.

case; her contention is that *de Castro* suports the differential treatment of divorced and non-divorced spouses in every instance. See Jur. Statement, at 14-15.

But the reasoning of *de Castro* is premised on the fact that the non-divorced wife needs the extra benefits to help with the burden of caring for a now-retired husband. See 429 U.S., at 188. It has no relevance to the survivor situation, where there is no spouse to care for. Moreover, as has been explained, Congress expressly determined that, in *this* context, the prior divorce is not a relevant consideration, for the death of the wage earner eliminated any differences in dependency between the divorced and non-divorced spouses. Contrary to the Secretary's position, *de Castro* does not stand for a *per se* rule that differential treatment between divorced and non-divorced individuals is invariably permissible.

In *Jobst*, this Court upheld a provision which required the termination of Social Security benefits when a dependent child married a non-recipient of benefits while a marriage between two beneficiaries would not affect eligibility. See 434 U.S., at 51. As with *de Castro*, the Secretary relies on this Court's observations — in this instance, the presumed effect of marriage on the recipient's dependency on his parents — to draw broad conclusions about the significance of marriage in general. Jur.Statement, at 13-14.

But again, the narrow context of that case does not permit its sweeping application to every situation in which a marriage occurs. In *this* case, once Congress had determined that divorced spouses were to be treated equally with their non-divorced counterparts upon the

death of the wage earner, it had resolved the issue. The Secretary is incapable of demonstrating how remarriage alters the dependency relationships between divorced surviving spouses and their deceased wage earners, while it has no effect on non-divorced spouses and their deceased wage earners. Remarriage simply has no bearing on the nature of those relationships. *Jobst* does not stand for the proposition that the event of remarriage automatically validates disparate treatment between classifications recognized as identical.

The Secretary's argument effectively amounts to that ultimately rejected by the district court, that Congress can always move one step at a time, regardless of the irrationality of a given step, because the long-range goal is legitimate. But a program which benefits some and not others must have a rational basis for that differential treatment. Once the legislature has determined that a particular classification is to be treated the same as another classification, it is not free to impose disparate treatment based on a factor unrelated to the classifications.

In a recent decision employing the rational basis test, this Court considered a scheme structurally similar to that here at issue and recognized that benefit programs must follow a rational progress in their development. *Hooper v. Bernalillo County Assessor*, 53 U.S.L.W. 4827 (June 24, 1985). Although Judge Byrne did not have the benefit of that discussion when he was reviewing the classificatory system in this case, his analysis closely parallels that of this Court.

In the *Hooper* situation, New Mexico decided to extend annual property tax exemptions to Vietnam veterans.

It limited the exemptions to resident veterans. It further limited them to "established" resident veterans, which it defined as those who had resided in the state before May 8, 1976. *Id.* at 4830.

This Court recognized that there were valid reasons to favor veterans over non-veterans, and to provide benefits to all resident veterans:

> "[T]he State may award certain benefits to all its bona fide veterans, because it then is making neither an invidious nor irrational distinction among its residents. Resident veterans, as a group, may well deserve preferential treatment, and such differential treatment vis-a-vis non-veterans does not offend the Equal Protection Clause."

Id. at 4836. But the distinction *among* resident veterans, based on date of residence, raised different considerations. The statute required no connection between prior residence and military service, and the effect was to discriminate against one group of resident veterans based on a factor which was unrelated to the overall purpose of the scheme. *Id.* at 4830.

The instant case describes a similar structure and raises many of the same considerations. New Mexico was free to extend benefits to all resident veterans, but it could not use an arbitrary date to distinguish within that class. Similarly, Congress was free to extend survivors' benefits to all surviving spouses, but it could not use the unrelated factor of a later remarriage to distinguish among survivors. In both instances, the legislatures' decisions to extend benefits were circumscribed by the requirement that they act rationally, so that the lines between favored and disfavored classifications were

logically premised on criteria relevant to the benefit program at issue.

2. The district court was therefore correct in finding the scheme constitutionally deficient. Summary affirmance on that ground alone is appropriate. But other factors also militate in favor of that result.

First, and significantly, the holding of unconstitutionality will have no prospective effect, for the challenged statutory scheme had ceased to exist well before the district court even ruled. The decision itself breaks no new ground, as the district judge merely applied established constitutional principles which this Court has since reiterated. Congress did not intend to force this Court to devote its full attention to holdings with such minimal implications.

"Congress . . . identified a narrow group of cases that merit the immediate and mandatory attention of this Court," and passed 28 U.S.C. § 1252 to bring those cases directly here, *Heckler v. Edwards,* 104 S.Ct. 1532, 1537 (1984), but this case only technically meets the requirements of that section. It is not among "the category of important cases", *id.* at 1539, that Congress believed should be immediately reviewed by this Court. While the decision below, like any decision holding a federal statute unconstitutional, "implicates separation of powers", *id.* at 1539, it does not disrupt the "certainty and uniformity in the federal government" which § 1252 was intended to address. *Id.* at 1539. Furthermore, it will have no "ramifications beyond the interests of litigants in the particular case." *Id.* at 1539; see also *Walters v. National Association of Radiation Survivors,* 53 U.S.L.W. 4947, 4951 (June 25, 1985).

The Secretary herself admits that, but for the certification of a class, she probably would not have sought review when Congress had already addressed the problem. (Jur. Statement, at 11-12.) She strongly implies that it was not the class itself (i.e., its existence or the amount of benefits) which prompted her decision, but, rather, her preoccupation with the relationship between 42 U.S.C. § 405(g) and class certification. (See *id.* at 12.) The Secretary is in effect attempting to use the direct appeal mechanism to present her theories about § 405(g) to this Court. Her interest in the constitutional issue which implicates the jurisdiction of this Court is only as a hook to obtain review of other, nonconstitutional issues.

Furthermore, the number of people affected by this decision is relatively small. The Secretary originally estimated that, in a one-year period, only 118 people would have been adversely affected by the statutory scheme. More recently, she has suggested a class of about 1000 members. Jur.Statement, at 26. Whatever the correct figure, the class is clearly small. Indeed, even using the higher figure for the class, the Secretary has recently estimated that the total payment required as a result of this case will be only $5.6 million.[7] Since the Social Security Administration pays out approximately $175 *billion* a year in its Old Age, Survivors, and Disability Insurance program,[8] the amount at stake in this case is in-

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[7] Affidavit of Jack Gallagher, ¶12, filed in support of Secretary's opposition to plaintiffs' motion to compel compliance, June 17, 1985.

[8] 48 *Social Security Bulletin* 5, at Table M-1, p. 49 (May, 1985) (published by Social Security Administration).

significant. No future benefits will flow from this case, so that the only impact of the decision below will be the payment of retroactive benefits to the class members.

The only practical question posed by this case is whether a small class of people will be compensated for periods ranging from one month to five years.[9] If the Court notes probable jurisdiction of this case, it will be agreeing to review a statutory scheme which has not existed since 1983, using a standard of review which was carefully employed by the district court and which has been stated and restated by this Court, including as recently as last month. While 28 U.S.C. § 1252 requires that this appeal come directly to this Court, none of the policy considerations motivating that procedure are present in this case. It does not warrant plenary review, and the decision below should be summarily affirmed.

II. THE APPEAL OF CLASS CERTIFICATION SHOULD BE DISMISSED AND REFERRED TO THE COURT OF APPEALS

As an initial matter, plaintiffs note that the Secretary is inaccurate in depicting the district court's analysis of 42 U.S.C. § 405(g) as a departure from controlling law. This Court and numerous lower courts have held in a variety of situations that exhaustion of administrative rem-

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[9] Given the district court's definition of the class, it is unlikely that any class members will be eligible for the full five years. Most will probably receive benefits based on a considerably shorter period.

edies is not invariably required under § 405(g).[10] Similarly, this Court has held that the sixty-day provision in that section is a statute of limitations, not a jurisdictional requirement.[11] Accordingly, the lower courts have regularly concluded that § 405(g) does not require putative class members to satisfy the sixty-day rule as articulated by the Secretary.[12] Given this authority, summary affirmance on the class issue would be appropriate.

Plaintiffs have requested this Court to summarily affirm on the merits, however. If this Court employs that suggested disposition, dismissal of the Secretary's class

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[10] *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975); *Johnson v. Heckler*, No. 85-1254 (7th Cir., July 30, 1985), slip op., at 9-10, aff'g 607 F.Supp. 875, 880 (N.D.Ill. 1984); *Klein v. Heckler*, 761 F.2d 1304, 1312 (9th Cir. 1985); *Boettcher v. Secretary of Health & Human Services*, 759 F.2d 719, 721-22 (9th Cir. 1985); *Reed v. Heckler*, 756 F.2d 779, 784-85 (10th Cir. 1985); *Polaski v. Heckler*, 751 F.2d 943, 952-53 (8th Cir. 1984); *City of New York v. Heckler*, 742 F.2d 729, 736-37 (2d Cir. 1984), pet. for rehearing denied, 755 F.2d 31 (2d Cir. 1985); *Lopez v. Heckler*, 725 F.2d 1489, 1500-03 (9th Cir.), vac'd and rem'd on other grounds 105 S.Ct. 583 (1984); *Kuehner v. Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983), vac'd and rem'd on other grounds 105 S.Ct. 376 (1984); *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 345-46 (3d Cir. 1977); *Dixon v. Heckler*, 589 F.Supp. 1494, 1500-01 (S.D.N.Y. 1984); *Avery v. Heckler*, 584 F.Supp. 312, 319 (D.Mass. 1984), aff'd on other grounds, 762 F.2d 158 (1st Cir. 1985); *Holden v. Heckler*, 584 F.Supp. 463, 481-83 (N.D. Ohio 1984).

[11] *Eldridge*, 424 U.S., at 328 n.9; *Salfi*, 422 U.S., at 764.

[12] *Johnson v. Heckler*, *supra*, slip op., at 10-11, aff'g 607 F. Supp., at 878; *City of New York*, 742 F.2d, at 737-38; *Lopez*, 725 F.2d, at 1505-06; *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 973 n. 19 (8th Cir. 1983); *Holden*, 584 F.Supp., at 483; *Kennedy v. Harris*, 87 F.R.D. 372, 376-77 (S.D. Cal. 1980; see also *Lloyd Noland Hospital & Clinic v. Heckler*, 762 F.2d 1561, 1564-65 (11th Cir. 1985) (interpreting identical provision in Medicare statute and relying on *Salfi* and *Eldridge*).

appeal is called for. This Court has expressly stated that when the only matter on appeal is not constitutional, § 1252 should not be literally construed to require a direct appeal. Rather, the "sense of the thing" controls, and this Court's docket should not be burdened with issues which Congress did not intend to be subject to direct appeal. *Edwards*, 104 S.Ct., at 1538. A logical reading of § 1252, and of this Court's "commonsense view" of it, *id.* at 1538, suggests that, if the constitutional appeal is summarily affirmed, the Court should decline to review any nonconstitutional issues which were also appealed.

There is no practical difference between the situation existent after the merits are summarily resolved, and that which obtained in *Edwards*, where only a nonconstitutional issue was appealed. In both situations, only the scope of relief was at issue on appeal. The only distinction, that an appeal on the merits was actually taken to this Court in this instance, is irrelevant; the conclusion in *Edwards* that Congress did not intend § 1252 to require this Court to crowd its docket with direct appeals of nonconstitutional questions is equally applicable here.[13] However important the Secretary may view the issues raised by its class action appeal, this Court has made it clear that the impact or importance of an issue is not the determining factor for the exercise of this Court's jurisdiction un-

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[13] Similarly, in *Montana Contractors' Association v. Kreps*, 442 U.S. 935 (1979), the Court dismissed a cross-appeal "for want of jurisdiction" after the government decided not to perfect its appeal on the constitutional issue. The only difference from this case is that here the appeal was perfected. In both instances, however, termination of the appeal on the merits should divest this Court of jurisdiction over the nonconstitutional issue.

der § 1252. *Edwards*, 104 S.Ct. at 1540. As this Court recently summarized:

> "[T]he decisions Congress targeted for appeal under § 1252 were those which involved the exercise of judicial power to impair the enforcement of an Act of Congress on constitutional grounds, and . . . it was the constitutional question that Congress wished this Court to decide."

Walters v. National Association of Radiation Survivors, *supra*, 53 U.S.L.W., at 4951.

In this case, the Court would properly implement the Congressional goal of limiting plenary review to appeals involving constitutional issues by dismissing the Secretary's appeal on the class question. Moreover, the Court will accomplish other goals important to docket control. In the usual case, issues percolate through the appellate courts, where they are distilled and refined. In this case, however, if the Court accords plenary review, it will be required to analyze the district court's discussion of exhaustion and the sixty-day rule without benefit of the views of three appellate judges. If the issues raised by the Secretary's class appeal are as important as the Secretary contends, then they deserve considerably more analysis at the lower court level before this Court is required to devote its full attention to these matters. The Court would still have the opportunity to review these issues after the Court of Appeals has added its insight to the analysis.

If this Court believes that those issues do warrant immediate review, dismissal of the Secretary's class appeal in this case will not preclude it from considering them.

They have been raised in a number of other cases,[14] and the Secretary has already requested review in two of those.[15] No purpose is served by using the instant case, which has been reviewed by only one judge, as the vehicle to test the validity of the Secretary's arguments regarding § 405(g).

The reasons outlined by this Court for declining to assert jurisdiction under § 1252 when the constitutional issue is not appealed are fully applicable to the situation where the constitutional issue is appealed but is summarily affirmed. Neither the intent of Congress nor this Court's need for docket control favors retention of a non-constitutional appeal in that situation. As in *Edwards*, "the formal prerequisites to direct appeal under § 1252 were met in the present case," 104 S.Ct., at 1541, but, also as in *Edwards*, no purpose would be served by slavishly following the literal terms of that provision to require this Court to maintain its appellate jurisdiction. Accordingly, if the Court summarily affirms on the merits, it should remand the Secretary's appeal on the class issue.

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[14] See cases cited *supra*, at 23 nn. 10, 12.

[15] *Heckler* v. *Polaski*, No. 85-55 (pet. for cert. filed, July 11, 1985) (exhaustion); *Heckler* v. *City of New York*, No. 84-1923 (pet. for cert. filed, June 10, 1985) (60-day rule and exhaustion).

CONCLUSION

On Question 1, the Court should summarily affirm. On Question 2, the Court should dismiss the appeal from its docket and remand it to the Court of Appeals.

Respectfully submitted,

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